No. 80-1167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES W. McCORD, JR.,
Petitioner,

v.

F. LEE BAILEY, GERALD ALCH,
BAILEY, ALCH AND GILLIS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a party who has received full and fair consideration of his claim by a court in a summary judgment-type proceeding may properly be collaterally estopped from relitigating that claim in another proceeding?

2. Whether the Supreme Court should define a uniform standard for the tort of attorney malpractice and whether it should review the Court of Appeals interpretation of the local District of Columbia standard?

3. Whether the district court's termination of discovery presents a federal question worthy of review where an abuse of discretion was not claimed and where the ruling was proper?

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-31a) is not yet reported.

JURISDICTION

Petitioner filed for a writ of certiorari on January 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In January, 1973, petitioner James W. McCord, Jr., was convicted of eight felony counts arising from his participation in the Watergate burglary. McCord at-

tacked his conviction both in a *coram nobis* petition and on direct appeal, alleging, *inter alia*, that his Sixth Amendment right to the effective assistance of counsel had been violated. The Court of Appeals, sitting *en banc*, accepted as true all of McCord's material allegations but rejected McCord's claims as without merit. *United States* v. *McCord*, 509 F.2d 334, 352 (D.C. Cir. 1974) (*en banc*), *cert. denied*, 421 U.S. 930 (1975).

On August 1, 1975, McCord filed the amended complaint in this case, making factual allegations virtually identical to those made in his appeal from his conviction but recast as civil causes of action for intentional and negligent malpractice, conspiracy and civil rights violations. *McCord* v. *Bailey*, No. 79-1085, slip op. at 5 (D.C. Cir., Sept. 9, 1980), Pet. App. 4a. After over two years of discovery, in February, 1978, the trial court dismissed all of McCord's claims by summary judgment.

The Court of Appeals affirmed the district court as to all but one of McCord's claims. *Id.*, Pet. App. 1a-31a.[1] The Court of Appeals recognized and McCord admitted that "no . . . material contentions" were raised in the civil suit which had not been heard and rejected in the criminal proceedings. *Id.* at 5, Pet. App. 4a. Since McCord had already been afforded a full and fair opportunity to litigate his claims of misconduct by his counsel, the Court of Appeals held that he had properly been precluded from relitigating them. *Id.* at 7-8, Pet. App. 6a-7a.

The Court of Appeals affirmed on the alternative ground that McCord could not demonstrate the existence of an essential element of his alleged torts—causally-related injury. McCord's claims of misconduct by his attorneys reduced to his assertion that his lawyers failed

[1] That claim was based on a provision of the Civil Rights Act of 1871, 42 U.S.C. § 1985(2), and is the basis of a cross-petition for a writ of certiorari in case number 80-1168.

to raise a defense which could have caused his acquittal; since the Court of Appeals reasoned that the defense was not available to McCord on the basis of the facts alleged, no injury followed from not raising the defense. *Id.* at 11, Pet. App. 10a.

REASONS FOR DENYING THE WRIT

1. The holding of the Court of Appeals on collateral estoppel accords with the decided cases and does not present an important federal question.

Petitioner McCord seeks review of the holding below that he is collaterally estopped from relitigating his malpractice claims, arguing merely that the court below erred in applying the doctrine against him, because in neither of the two prior proceedings in which his allegations of attorney misconduct were decided was he afforded an evidentiary hearing. Nowhere, however, in McCord's petition does he identify any "special and important reasons" why certiorari should be granted as to this (or any other) question presented. *See* Rules of the Supreme Court, Rule 17.

McCord claims that collateral estoppel should not have been applied in his case, because he was never afforded a "full and fair opportunity to prove a claim" [2] of attorney misconduct during the criminal proceedings. He argues that the Seventh Amendment requires that he be afforded a jury trial on the same allegations that the Court of Appeals, in the criminal proceedings, assumed to be true but rejected as legally insufficient to establish misconduct by McCord's attorneys. But this Court has noted: "No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined." *In re Peterson*, 253 U.S. 300, 310 (1920). Here, no such facts exist because McCord's

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[2] *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 324-25 (1971).

allegations were accepted as true in the prior adjudication and found wanting to support a claim.[3]

Collateral estoppel applies to findings made in a nonplenary proceeding, including summary judgment.[4] Thus, no question worthy of the writ is presented by the application of the doctrine to contentions made in a civil case when those same contentions, accepted as true, were rejected as legally insufficient in a prior criminal proceeding.[5] Moreover, since the court below rested its decision on alternative state law grounds (*see* discussion § 2, *infra*), the claimed federal question presented by McCord does not even need to be decided.

2. The second and third questions proffered by petitioner involve only the state law matter of the appropriate standard for malpractice liability.

McCord asks this Court to grant his petition to review the relationship between the standards for mal-

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[3] In effect, McCord does no more than contest summary judgment procedure as inconsistent with the Seventh Amendment, an argument rejected by this Court long ago. *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, 319-21 (1902).

[4] *See, e.g., Jackson* v. *Hayakawa*, 605 F.2d 1121 (9th Cir. 1979); *Exhibitors Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F.2d 110 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *Hubicki* v. *A.C.F. Industries Inc.*, 484 F.2d 519 (3d Cir. 1973); *Lauchlin* v. *United States*, 444 F.2d 1037 (7th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); *In re Falstaff Brewing Corp. Anti-Trust Litigation*, 441 F. Supp. 62 (E.D. Mo. 1978); *Neeld* v. *National Hockey League*, 439 F. Supp. 446 (W.D.N.Y. 1977).

[5] The dissent in the court below argues that collateral estoppel should not necessarily apply in this case only because there is an "unusual combination of circumstances" present. *McCord* v. *Bailey*, slip op. at 5-6, Pet. App. 28a-29a (Wald, J., concurring in part, dissenting in part.) That a decision "turns on its own facts" is itself a sufficient ground for denying certiorari since the time of the Court is ill-spent in cases of limited applicability.

practice liability and the Sixth Amendment right to the effective assistance of counsel and to review a purported holding that a criminal conviction bars a subsequent civil suit for malpractice. Petitioner's questions, however, suffer the fatal defect that they raise no federal question. As this Court has recently indicated:

> [The Supreme Court is] not concerned with the elements of a state cause for action for malpractice . . . . For when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law . . . .

Ferri v. *Ackerman*, 444 U.S. 193, 62 L. Ed. 2d. 355, 359-60 (1979). Just as a state is free to define defenses to a malpractice claim, it is free to define the claim itself. Since McCord has failed to demonstrate, or even allege, any "conflict with federal law," the writ should be denied.[6]

3. The district court's discovery ruling does not present an imporant federal question and, in any event, was correct.

McCord contends that a procedural ruling of the district court, terminating discovery for both sides over two years after the complaint was filed, should be reviewed. However, the propriety of such a ruling hardly con-

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[6] Indeed, a recent rules amendment reflects the Court's apparent disinterest in reviewing such decisions even in otherwise appropriate cases. *See* Stern & Gressman, "Supreme Court Rules, The 1980 Revisions," 27 CRIM. L. REP. 4109, at 4116 (July 2, 1980):

> . . . Rule 17 omits one item that was set forth in former Rule 19—a federal court of appeals decision that resolves "an important state or territorial question in a way in conflict with applicable state or territorial law." The omission doubtless reflects the Court's lack of interest in reviewing diversity cases where the only issue is an alleged conflict with applicable state law.

stitutes an important federal question, particularly where no abuse of discretion by the trial judge or prejudice to litigants is claimed; appellate review of discovery rulings is routinely declined where these factors are not present. *See, e.g., Admiral Treatre Corp.* v. *Douglas Theatre Co.*, 585 F.2d 877, 898-99 (8th Cir. 1978). *See also* 28 U.S.C. § 2111 ("On the hearing . . . in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.")

The discovery ruling was, moreover, a proper one.[7] It occurred after ample time for discovery had passed (Pet. App. 3a), it was made well in advance of its cut-off date (giving parties ample time to complete discovery), and it served the salutary purpose of creating an opportunity for the filing of dispositive summary judgment motions. Indeed, petitioner McCord himself filed a summary judgment motion as to liability, confirming that he believed his discovery to be complete.

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[7] This Court has recently observed that "judges should not hesitate to exercise appropriate control over the discovery process." *Herbert* v. *Lando*, 441 U.S. 153, 99 S. Ct. 1635, 1649 (1979).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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